



POLICE DEPARTMENT CITY OF NEW YORK

May 11, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Alexander Montanez
Tax Registry No. 927222
47 Precinct
Disciplinary Case No. 2015- 13370

Charges and Specifications:

1. Said Police Officer Alexander Montanez, on or about February 2, 2014, at approximately 1031 hours, while assigned to the 47th Precinct and on duty, in the [REDACTED] [REDACTED], did wrongfully use of force against GREGORY KELLY, in that he punched him in the face, without police necessity. *(As amended)*
P.G. 203-11 - USE OF FORCE

Appearances:

For CCRB-APU: Andre Applewhite, Esq.
Civilian Complaint Review Board
100 Church Street, 10th floor
New York, New York 10007

For the Respondent: Craig R. Hayes, Esq.
Worth, Longworth & London, LLP
111 John Street-Suite 640
New York, New York 10038

Hearing Dates:

November 20, 2015 and February 11, 2016

Decision:

Guilty

Trial Commissioner:

ADCT Robert W. Vinal

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on November 20, 2015 and February 11, 2016. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. CCRB called Gregory Kelly as a witness and offered in evidence video recordings. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

The events that lead to Respondent's face-to-face interaction with Gregory Kelly on a football field in [REDACTED] are largely not in dispute. Kelly, who admitted that he was a heroin dealer during the mid-1990s, candidly acknowledged that he is presently a cocaine user who regularly steals items from stores and sells them to get money to buy cocaine. On February 2, 2014, at about 10:30 a.m., Kelly entered [REDACTED] [REDACTED] with a friend. Kelly stole an electric shaver and put it inside his jacket. As he and his friend exited [REDACTED], he heard the store alarm go off so they began walking quickly down the street.

Respondent and his partner, Police Officer Padilla, immediately responded to [REDACTED] in their marked RMP after receiving a radio transmission that a larceny was in progress there. A [REDACTED] security guard told them that he had seen males stealing items and leaving the store. Respondent and Padilla canvassed the area, with the security guard, in their RMP. The security guard spotted Kelly and his friend and told Respondent that they were the thieves. When Respondent pulled the RMP up next to Kelly and his friend, they began running away in

different directions. Respondent followed Kelly in the RMP but when Kelly ran onto a fenced-in grassy area, Respondent got out of the RMP and ran after Kelly alone on foot.

Respondent caught up to Kelly near a fence and Kelly turned around to face Respondent. Here their stories diverge. Kelly asserted that he intended to surrender to Respondent but that when Respondent told him, "Move and I'll shoot you," he became "spooked" by this remark and so he ran off again. Respondent asserted that he ordered Kelly to get on the ground and place his hands behind his back; that Kelly did not comply with this order; that when he moved closer to Kelly to try handcuff him they engaged in a "little wrestling match;" that Kelly pushed him away; and that when Kelly ran away again he ran after him. Kelly eventually ran onto an empty football field. Respondent caught up to him at about mid-field and Kelly turned around to face Respondent.

I find that neither the trial testimony of Kelly nor the trial testimony of Respondent can be relied upon in reaching a finding regarding the charge at issue because Kelly's testimony regarding his own actions is inconsistent with his claim that he wanted to surrender to Respondent, and because some of Respondent's testimony at this trial was at odds with statements he made at his CCRB interview.

Kelly asserted that he had actually wanted to surrender to the police "the whole time." However, when Kelly was asked why he had continued running even after he realized that a police officer was chasing him, Kelly offered the nonsensical answer that he had kept running because he was "already in motion." Also, Kelly acknowledged that when he reached the entrance to the football field he heard Respondent call to him, "I got you now." However, rather than stop, Kelly continued to move away from Respondent. Kelly was asked why, when he entered onto the football field, he did not immediately stand still but instead walked about 30

yards down the football field. Kelly offered no plausible explanation for why he did this. Although Kelly acknowledged that he was tired from running and was trying to catch his breath, he denied that his action of continuing to walk away from Respondent was merely a precursor to starting to run again once he had caught his breath. Finally, even though Kelly agreed that the best way for a person to show a police officer that he is surrendering is to raise his hands in the air, drop to his knees and say that he is surrendering, Kelly admitted that he never did any of these things.

At his CCRB interview, Respondent stated that when he caught up to Kelly on the football field, Kelly raised his hands up in a fighting posture; that he "grabbed" Kelly's jacket; that he was "wrestling" Kelly "down and he didn't want to go down;" and that Kelly then "threw like a little swing at me, hit me in the face, and then I hit him in the face and then he fell down" and "then I handcuffed him." Respondent also stated that Kelly had swung at him using his right hand and that Kelly's right hand had hit him under his ear. Respondent further stated that he had punched Kelly because "he was resisting" and because Kelly "took a swing at me."

However, during Respondent's testimony at this trial (after Respondent had viewed the video evidence which depicts his encounter with Kelly on the football field), Respondent agreed that while they were on the football field, Kelly had not raised his hands to strike him, that Kelly never took at swing at him, and that Kelly's hand never struck him.

Since Respondent's trial testimony contradicts claims he made during his CCRB interview, I find that I cannot credit any of his testimony including his claim that the reason that he punched Kelly in the face was because he genuinely believed that Kelly was going to fight him because Kelly "clenched up his fists" and "tensed up his arms."

Videos recorded by three security cameras were offered in evidence by the Administrative Prosecutor [CCRB Exhibit (CCRBX) 1]. These videos depict Kelly and Respondent on the football field from three different angles.¹ Kelly is seen entering the football field and walking about 30 yards down the football field at which point he stops walking and turns to face Respondent who has been walking faster behind him and has caught up to him. Respondent and Kelly then engage in what appears to be a face-to-face conversation. Respondent does not attempt to handcuff Kelly. Even though the video evidence shows that Kelly's arms are hanging passively on the sides of his body, and even though Kelly is not seen engaging in any aggressive or resistive actions, Respondent punches Kelly in the face once which causes Kelly to fall to the ground. Most significantly, the video evidence shows that at the exact point when Respondent punches Kelly, two officers are running toward Respondent and Kelly and one is only a step or two away from reaching them.

Based solely on this video evidence, I find that Respondent's punch to Kelly's face was unnecessary, and therefore gratuitous, because if Respondent believed that he needed assistance to handcuff Kelly, help was readily at hand. Therefore, I find Respondent guilty of having wrongfully used force against Kelly by punching him in the face without police necessity.

Finally, it is not disputed that Respondent's punch to Kelly's mouth resulted in Kelly losing a tooth and necessitated the insertion of three stitches inside Kelly's mouth and one stitch outside his mouth to close the wound to his mouth (CCRBX 2), and that Respondent received three stitches on the knuckles of the hand he used to punch Kelly.

¹ Camera h8.1231 (1135 East 226 Street) faces one end of the football field; camera B28C04 (1138 229 Dr.) faces a ramp leading to the field and the football field; and camera B28C05 (1138 229 Drive) faces the stadium and the football field.

PENALTY RECOMMENDATION

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974). Respondent was appointed to the Department on September 29, 2000. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached Confidential Memorandum.

The Administrative Prosecutor recommended that Respondent forfeit 20 vacation days as a penalty. The Administrative Prosecutor did not cite any previous disciplinary decisions to support this penalty recommendation.

Respondent punched Kelly so hard that Respondent had to receive three stitches on his knuckles and Kelly had a tooth knocked out and needed several stitches to close the wound to his mouth. In *Case No. 2014-12487* (Sept. 10, 2015), a five-year police officer forfeited 15 vacation days as a penalty for punching a prisoner once in the mouth so hard that he broke the prisoner's jaw. However, the officer in that case had no prior disciplinary record.

Respondent has a prior disciplinary record. On January 3, 2012, Respondent forfeited 40 vacation days and was placed on dismissal probation for one year as a penalty for engaging in four acts of misconduct during 2008 and 2009 (see attached Confidential Memorandum). One of the acts that Respondent admitted to was that he had threatened a fellow officer by telling her: "You are my target right now. I told you don't fuck with me. You hurt me so I am going to hurt you. I want you to regret you ever met me. You are done. You are a tombstone to me."

When Respondent's prior misconduct is viewed in conjunction with Respondent's present misconduct, it raises questions about Respondent's ability to exercise self-control. Since Respondent committed his present misconduct only 13 months after he had completed serving

his one year period on dismissal probation, another one year period on probation appears to be warranted.

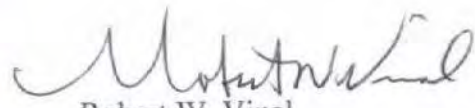
Therefore, it is recommended that the Respondent be DISMISSED from the New York City Police Department, but that his dismissal be held in abeyance for a period of one year, pursuant to Section 14-115 (d) of the Administrative Code of the City of New York, during which time he is to remain on the force at the Police Commissioner's discretion and may be terminated at any time without further proceedings. It is further recommended that Respondent forfeit 15 vacation days.

Respectfully submitted,

APPROVED

JUL 28 2016


WILLIAM J. BRATTON
POLICE COMMISSIONER


Robert W. Vinal
Assistant Deputy Commissioner Trials



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER ALEXANDER MONTANEZ
TAX REGISTRY NO. 927222
DISCIPLINARY CASE NO. 2015-13370

Respondent received an overall rating of 4.0 on his 2015 annual evaluation, 4.0 on his 2014 evaluation, and 4.0 on his 2013 evaluation. He has been awarded 17 Excellent Police Duty medals. [REDACTED]

[REDACTED] On September 11, 2009, he was placed in Level-II discipline monitoring based on his overall record. This monitoring ended on January 3, 2012.

He has a formal disciplinary record. On January 3, 2012, he forfeited 40 vacation days and was placed on dismissal probation for one year as a penalty after he pleaded guilty to having made inappropriate and potentially threatening remarks to another officer while off-duty and to failing to timely re-register his personal automobile; and after he was found guilty of associating with a person he had reason to believe had engaged in criminal activity and having failed to request the response of the patrol supervisor to the scene of an off-duty incident during which he had identified himself as a police officer to a cab driver.

For your consideration.

Robert W. Vinal
Assistant Deputy Commissioner Trials